Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. 79-1370

PHILIP JAY FETNER,

Petitioner,

vs.

FEDERAL LAND BANK OF BALTIMORE,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

BRIEF IN OPPOSITION

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In The

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BRIEF IN OPPOSITION

This brief is submitted on behalf of respondent Federal Land Bank of Baltimore (hereinafter "the Bank"), in opposition to the petition for a writ of certiorari to the Superior Court of Pennsylvania filed by petitioner Philip Jay Fetner (hereinafter "Fetner").

INTRODUCTION

This is a simple action involving a long-standing default in a routine residential mortgage which is controlled by well-settled principles of state law, in defense of which Fetner interposed various irrelevant and unrelated allegations below; there is no basis for issuance of a writ of certiorari in this case.

The petition presents no special or important reason why the writ should be granted. Supreme Court Rule 19(1).

There is no conflict between the decisions of any courts of appeals involved in this case.

This case does not present a substantial or important question of federal law which has not been, but should be, decided by this Court.

This case does not present any question of conflict with any applicable decision of this Court.

The decision rendered below by the Pennsylvania Superior Court rests upon adequate state grounds.

OPINIONS BELOW

Petitioner Fetner states in his petition that the opinions of the Superior Court of Pennsylvania and of the Court of Common Pleas of Bucks County, Pennsylvania are reprinted in the appendix to his petition. However, he has failed to include the latter, which is therefore reprinted in Appendix A to this brief.

THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Superior Court of Pennsylvania properly hold that the trial court did not abuse its discretion in the conduct of the trial of this mortgage foreclosure action?

2. Did the Superior Court of Pennsylvania properly hold that the trial court was correct in dismissing those counterclaims to the mortgage foreclosure action which were based upon the Federal Securities Act of 1933 and the Securities Exchange Act of 1934?

COUNTERSTATEMENT OF THE CASE

This matter is before your Honorable Court due to petitioner Fetner's request for review of the decision of the Pennsylvania Superior Court at No. 2096 October Term, 1978, filed September 14, 1979, which affirmed the July 6, 1978 judgment of the Court of Common Pleas of Bucks County, Pennsylvania, sitting without a jury, in a mortgage foreclosure action.

The procedural history is that the Bank commenced an action in the Court of Common Pleas of Bucks County, Pennsylvania in Mortgage Foreclosure by Complaint filed on March 16, 1977 against Fetner. The Bank's complaint alleged that in October 1974, Fetner had borrowed the sum of $117,500 from it, secured by a mortgage upon some twenty-five acres located in Nockamixon Township, Bucks County, Pennsylvania. The complaint further alleged that Fetner had defaulted on the mortgage by failing to pay some $8,106.38 in monthly installments due (in accordance with the mortgage bond) from July 1, 1976 to February 1, 1977, and by failing to pay real estate taxes in the amount of $1,659.16. The Bank's complaint recited that as a result of the preceding it was exercising its right to acceleration under the terms of the mortgage. Judgment was demanded and was entered after trial for unmatured principal, monthly installments due, interest, real estate taxes and attorney's commission totalling $137,195.45.

The record below discloses that Fetner wished to purchase a "gentleman's country estate and horse farm," and that he met with the local manager of the New Britain Branch of the Southeast Federal Land Bank Association, Mr. Albright, to

request financing in June of 1974. He told Albright that he planned to pay $180,000 for the country estate and that he wanted 80% financing. Fetner signed an agreement of sale with the owners of the property that contained a 75% mortgage contingency. Prior to settlement, the Bank approved approximately $110,000 in net financing and limited secondary financing to $35,000. Meanwhile, Fetner ordered title insurance from a title company and received a preliminary title report that did not show an easement to the Pennsylvania Department of Transportation (PennDOT) which was *later* created and placed of record on October 1, 1974. At settlement on October 9, 1974, a final title report was on hand that showed the easement.

Fetner, who is an attorney, purchased the property and accepted and executed a mortgage of some $117,000. There is no dispute that he signed the documents or that he received the proceeds. At the time that he did so it appears that he had the final title report showing the PennDOT easement; there is no evidence of record that he did not understand the amount or the terms of the mortgage or that he thought he was signing something else when he signed the documents. There was also no evidence that the Bank had any involvement in the creation of the PennDOT easement.

In November of 1974, Fetner left his job and fell behind in his payments on the mortgage. The Bank threatened foreclosure, but ultimately did not foreclose. In March 1976, Fetner became current. In the meantime, he had not paid the real estate taxes; the Bank paid 1975 and 1976 taxes pursuant to its ability to do so under the mortgage. In July of 1976, Fetner again fell behind in his payments. ***He has not made any payments on the mortgage since.*** (His pleadings claimed that he made a $2,000 payment in October or November of 1976; however, he produced no evidence of such payment at trial.) In March of 1977, the Bank filed the aforesaid simple action in mortgage foreclosure, consisting of ten paragraphs. Fetner responded by first filing preliminary objections and then by filing a 169 paragraph answer, new matter and counterclaim. The

counterclaim contained eleven counts and demanded, in the aggregate, $2,250,000 in compensatory damages and $5,150,000 in punitive damages.

The answer filed by Fetner first denied that the document was "a mortgage." Review of that document reveals that it quite clearly has every attribute of a rather ordinary real estate mortgage (*see* R12a, 747a). Secondly, Fetner's answer denied that he had "defaulted." However, he produced no evidence at trial tending to show that he had made any payment subsequent to July 1, 1976. The Bank, on the other hand, produced evidence that he had not paid any of the unpaid amount.

The opinion of the Bucks County Court of Common Pleas, Bodley, J., dated September 8, 1978 sets forth the nature of the new matter and of the counterclaim filed by Fetner concisely and completely. Reduced from 169 paragraphs to the simplest of terms, Fetner's $7,400,000 counterclaim to a $137,195 action in mortgage foreclosure consisted of three claims: (a) that the Bank breached an alleged duty to him by not disclosing on October 9, 1974 that PennDOT had obtained an easement on the property on October 1, 1974 (he also claimed that his nondisclosure was a fraudulent omission of material fact contrary to the Securities Exchange Act of 1934); and (2) that the Bank represented to him that it would provide 80% financing and certain secondary financing limits but that it instead offered 60% financing and a lower secondary financing limit (which Fetner accepted); and (3) that it would be "lenient" if he fell behind in payments but that it foreclosed when Fetner became in arrears a second time.

Discovery consisted of three sets of interrogatories propounded by Fetner and of the depositions of two persons, taken by Fetner and by his counsel. At the non-jury trial, the Bank called two witnesses, through whom it intoduced the mortgage, mortgage bond and real estate mortgage bond, and established that the total debt as of February 15, 1978 (with interest to October 14, 1978) was $147,906.97, that Fetner's last

payment was made on July 6, 1976, and that he remained in possession of the premises through the date of the hearing without making *any* further payments.

Fetner also called two witnesses at trial, including an agent of the Bank, as on cross, and Fetner himself. Throughout the trial, counsel for Fetner sought to ask questions which related neither to the Bank's right to foreclose nor to the allegations of fraud in the inducement. The trial court limited the testimony to evidence tending to show a defense to nonpayment after July 1, 1976 or to those counterclaims which *arose from* the mortgage transaction. With respect to both his witnesses, Fetner was given repeated opportunity throughout the trial to present relevant evidence concerning the above points. When such evidence was not offered after the lower court repeatedly asked if such evidence could be produced, testimony of the witnesses was deemed concluded.

The Bank's first witness at the hearing held on February 15, 1978 was Richard S. Carpenter. On cross-examination, the trial judge ruled that a number of questions asked by counsel for the defendant were beyond the scope of the direct testimony (R595a). The following occurred at the conclusion of the cross-examination (R596a-597a):

"BY MR. BECKERT:

Q. Are you familiar with the papers that are signed by a prospective borrower prior to and up to settlement that are furnished by the Federal Land Bank of Baltimore?

MR. HERSHENSON: Objection.

THE COURT: The objection is sustained.

BY MR. BECKERT:

Q. Are you aware of any documents that any borrower receives?

THE COURT: Mr. Beckert, won't you confine yourself to the direct examination.

If you wish to call the witness as your own—I understand you subpoenaed him—you may.

BY MR. BECKERT:

Q. How would any borrower know that the Federal Land Bank of Baltimore is a Federal instrumentality?

MR. HERSHENSON: Objection.

THE COURT: The objection is sustained. You need not answer the question. Is there anything else?

MR. BECKERT: Your Honor, could you give me just a moment?

THE COURT: Yes.

* * *

BY MR. BECKERT:

Q. Has the Federal Land Bank of Baltimore ever applied to be incorporated in the State of Maryland?

MR. HERSHENSON: Objection.

THE COURT: The objection is sustained.

MR. BECKERT: I have no further questions.

* * *

(Witness excused.)"

The Bank's second witness was John R. Wright, manager of data services for the Bank. Mr. Wright testified as to the mortgage loan accounting system of the Bank and as to his calculation of the status of Fetner's account. Mr. Wright testified that the last payment made by Fetner was made on July 6, 1976 and that the total amount owed on account of the mortgage was $147,906.97 (R603a). Fetner's cross-examination of Mr. Wright was directed to the means by which Mr. Wright verified the figures to which he testified in chief.

Fetner's first witness was Russell Albright, the manager of the New Britain Branch of the Southeast Federal Land Bank Association. Mr. Albright was called as on cross. Prior to commencement of Mr. Albright's testimony, the following conversation occurred between counsel for Fetner and the court (R631a-635a):

"MR. BECKERT: I would like to call Russell Albright.

THE COURT: Come forward, please.

MR. HERSHENSON: I would like an offer of proof.

THE COURT: Would you state for the record what you intend to prove through this witness?

MR. BECKERT: Let me state at the outset I'm calling Mr. Albright as on cross-examination.

He's an agent of the plaintiff. He's the local officer and present manager of the New Britain branch of the Southeast Association.

THE COURT: You may call him as under cross-examination.

What do you intend to prove by this witness?

I understand you have the feeling that he may be an unfriendly witness, and I'm permitting you to call him as on cross-examination.

Assuming he will testify forthrightly to questions asked, what do you intend to prove?

MR. BECKERT: I intend to prove Mr. Albright is the agent for the Federal Land Bank—first of all, I can prove he was the agent —

THE COURT: He was what?

MR. BECKERT: That he was the agent for the Federal Land Bank of Baltimore.

That in that capacity he and Mr. Fetner and others discussed the nature of the Federal Land Bank of Baltimore, and certain representations were made to Mr. Fetner at that time regarding the nature of the Federal Land Bank in the nature of the mortgage.

THE COURT: In the nature of what?

MR. BECKERT: Of the mortgage. The nature of the position of the bank and the nature

of the commitment that Mr. Albright could make at that time representing the moneys that would be available for a loan.

That based on those reliances and those inducements, Mr. Fetner and Mr. Albright exchanged certain documents, whereby a loan application was made.

I intend further to prove that thereafter Mr. Albright did certain things.

THE COURT: Did what?

MR. BECKERT: Made certain appraisals; contacted persons who were involved in the transaction; had access to other documents, which would lead him to indicate that the nature of the transaction as he understood Mr. Fetner intended to make it may not have coincided as to his understanding as it was occurring.

That he, thereafter, acted as the agent for the bank with reference to a reduction in the commitment and explanations as to their reductions, which ignored the existence of certain facts known personally to Mr. Albright, which he neglected to state to the defendant, which were relevant to the transaction into which the defendant was going.

THE COURT: Do you have any precedent of any sort for what you're doing here?

Do you have any kind of authority for your position? If you do, I would want to recess and study it.

I'll be very frank with you: I had my law clerk study this. I have reviewed those notes that I have in such matters and I still cannot understand your position in this regard.

Your client sought funds and he received funds. He signed certain documents; as a result of that there was a settlement.

Certainly there are other collateral matters. But, I don't understand where you're going.

Do you have any legal authority for your position?

MR. BECKERT: I didn't understand Your Honor, that today, when it was never a pleading which related there was a deficiency in the counterclaim --

THE COURT: I'm not asking you what you didn't understand.

When you prepare a case, you know what the law is well before you come into court and well before depositions.

Unfortunately, I have not found that law which apparently you have found. I'm simply asking for it, because in the absence of authority I would not permit you to delve into these things.

MR. BECKERT: The theory of the case is that Mr. Albright fraudulently induced the defendant to enter into a contract.

THE COURT: In other words, Mr. Albright fraudulently induced your client to borrow

money from the Federal Land Bank; that is what you're offering to prove?

MR. BECKERT: Yes.

THE COURT: Go ahead and establish that. But stick to that."

After completion of the above colloquy, Fetner established through Mr. Albright's testimony that the witness met with Fetner and Elizabeth James in May of 1974 to formulate an application for a mortgage with the Bank (R636a). Mr. Albright stated that he told Fetner that the Federal Land Bank operated as a cooperative (R636a), that discussions centered on the eligibility of the property for a Federal Land Bank mortgage (R638a-639a), that Fetner was told that in order to obtain a loan he would have to purchase one share of stock at $5.00 value for each hundred dollars borrowed (R639a), and that the association was owned by its borrowers (R643a). He also stated that he was advised that Fetner wished to obtain 80% financing of $180,000 (R647a), that an application and financial statement was taken (R647a), that it appeared to him that the application would be favorably acted upon (R648a), and that he knew that Fetner had not then executed an agreement of sale on the property (R649a).

Mr. Albright further testified as on cross that he appraised the property for $168,000 (R651a), that his employer, the Southeast Federal Land Bank Association approved the application (R654a), and that it was then forwarded to the Federal Land Bank of Baltimore (R654a), which required more information, including what other financing was contemplated (R655a). A letter was read into the record in which Mr. Albright advised Miss James (defendant's real estate agent) (R665a), that the Bank was willing to make a loan which would net $110,544, provided that the borrower Fetner could make up the difference from other sources, which the Bank wished to know of prior to settlement (R662a). A commitment letter was ultimately issued for $109,950.63 (R667a).

Fetner also sought to establish through Albright's testimony that Albright knew of the easement through the Bank's appraisal process but that he did not disclose the existence of same to Fetner. Judge Bodley ruled in effect that such testimony was not relevant under Pennsylvania law because, as was later affirmed and restated by the Pennsylvania Superior Court on appeal, a lender or its mortgage procuring agent has no duty to search out title defects and disclose them to the borrower. The trial judge made the following statements, after which Mr. Albright's testimony was concluded (R689a, 695a):

"THE COURT: You suggested there was some fraud somewhere.

This is not the seller. This is the lending institution.

If you can offer me anything — and perhaps you should have prepared a trial brief which would have outlined the law — that you, by any stretch of your imagination, not mine, gives you the right or your client to defend this foreclosure proceeding by the nature of these counterclaims, I would be glad to hear it.

But in the absence of my finding any legal basis — You may have a conference with your client.

MR. BECKERT: Thank you."

Fetner's second witness was himself. His testimony was that he was looking, in early 1974, for a secluded horse farm to pursue his various hobbies (R696a), that he met with Mr. Albright to obtain financing on the property, that the advantages of a loan with the Bank were explained to him (R700a), that he indicated why he wanted the property (R702a), and that Albright said he would recommend the loan (R704a).

He further testified that he signed an agreement of sale on the property based on assurances by Albright that he would recommend the loan (R704a), but that the agreement of sale nevertheless contained a mortgage contingency based upon the financing discussed (R705a). Mr. Fetner further testified that he considered an August 2, 1974 letter from Albright to Miss James (R662a) to be a "commitment letter", (R710a), and that he was "enraged" and felt that Albright had "lied" to him when he learned, while out of the country, that the Bank would loan him only $117,000 (R708a).

Counsel for Fetner then sought to inquire as to contact between Fetner and Albright *following* settlement. The following transpired (R720a-722a):

> "Q. When was the next time after settlement you had contact with Russell Albright?
>
> MR. HERSHENSON: Your Honor, I must object to any contact after settlement.
>
> THE COURT: The objection is sustained as to anything after settlement.
>
> MR. BECKERT: Your Honor, are you ruling I can inquire into no contacts between the plaintiff and defendant or the defendant and Mr. Albright after settlement?
>
> THE COURT: I'm ruling it's immaterial what happened after settlement. The loan was then consummated.
>
> The documents speak for themselves.
>
> MR. BECKERT: Your Honor —
>
> THE COURT: Is there anything else of this witness?

> MR. BECKERT: May I make an offer of proof at this time?
>
> THE COURT: Is there anything else of this witness —
>
> MR. BECKERT: Well —
>
> THE COURT: —in regard to your allegations which have to do with the counterclaim and which relate to matters prior to settlement?
>
> MR. BECKERT: I have a lot of questions.
>
> THE COURT: As to fraudulent inducement?
>
> MR. BECKERT: I have a lot of questions about the counterclaim, Your Honor.
>
> THE COURT: You may have a lot of questions about what happened after settlement, and I will rule that immaterial."

Fetner was later asked by the court whether he ever fell behind in his mortgage payments. He indicated that he had (R724a) and that he thereafter contacted Mr. Albright to explain why (R724a-726a), including the fact that he had resigned from his job. Testimony was then offered to attempt to show that the Bank had agreed to "be lenient" regarding the account in 1975 and early 1976 (R736a) and that defendant brought his account current in March 1976. However, no evidence was introduced to show payment subsequent to July 1976, or to show "leniency" offers after March 1976. The court then indicated that Fetner had not produced evidence tending to show any legal defense to nonpayment subsequent to July 1, 1976 and that no evidence had been shown tending to support the counterclaims in law (R740a-746a). Mr. Fetner was asked to step down.

The trial court entered its decision on February 21, 1978 in favor of the Bank. Exceptions and supplemental exceptions were filed and were dismissed on June 15, 1978. Appeal to the Pennsylvania Superior Court followed and an opinion was issued on September 14, 1979. A petition for reargument was denied by that court on January 9, 1980. A petition for allowance of appeal was denied on December 10, 1979 by the Pennsylvania Supreme Court, and this petition followed.

REASONS FOR DENYING THE WRIT

I.

The Superior Court of Pennsylvania properly held that the trial court did not abuse its discretion in the conduct of trial herein and there is no need for review.

This case is a simple mortgage foreclosure action. It does not present any substantial federal question, nor does it deal with a conflict with any decision of this Court nor between any courts of appeals.

What occurred below was that Fetner sought to defend an action against him for failing to pay his mortgage, not by defending on the merits, but by seeking to assert, in the form of a $7,400,000 counterclaim, various claims that were unsupported in law.

He now claims, as he did below, that the trial judge was prejudiced (although he observes at page eleven of his brief, that "[i]t must be ruefully admitted that petitioner-defendant inadvertently 'fueled' Judge Bodley's prejudices."). He also claims that he was denied *proper* discovery, that he was not allowed to cross-examine *completely*, that his witnesses were not allowed *full* opportunity to testify and that he was denied an opportunity to make *final* argument. It is readily apparent that each of the claims made by Fetner here relate to the routine conduct of a civil trial and to the relationship thereof to ordinary Pennsylvania trial procedure and evidentiary questions.

With respect to his claim concerning cross-examination and examination of witnesses, it is well-established that a trial judge has broad discretion in the conduct of a civil non-jury trial and that, upon review, the standard is whether the lower court abused its discretion. *E.g., Commonwealth ex rel. Friedman v. Friedman,* 223 Pa. Super. 66, 297 A.2d 158, *allocatur denied,* 223 Pa. Super. xxxv (1972), citing *Baxter v. Philadelphia,* 426 Pa. 240, 231 A.2d 151, *appeal dismissed,* 389 U.S. 573 (1967). Of the eleven issues raised below before the Superior Court, no less than six addressed alleged trial errors. These alleged errors were thoroughly briefed and argued before the Pennsylvania Superior Court. By its affirmance below, the Superior Court recognized that the trial court exercised its discretion in the conduct of the trial without abuse. These are the same alleged errors about which Fetner now complains to this Court and which he seeks to bootstrap into "due process" questions. What is overlooked in Fetner's claims of due process violations is that the trial judge properly concluded that the majority of Fetner's alleged defenses and counterclaims were either unsupported in law or procedurally inappropriate. Consequently, evidence relating to those claims was not relevant to the trial of this matter. "Evidence which has a bearing on the issues presented by the raising of a defense is admissible, *but evidence which, if admitted, will make no defense, is properly rejected.*" (emphasis supplied). 14 P.L.E. Evidence §52, at 343.

It is in the above context that Fetner's claims of procedural error in the conduct of the trial must be viewed. Having properly determined that the only issues presented that constituted defenses or a counterclaim were Fetner's allegations of fraud in the inducement and his claim that there was no default, the trial judge insisted that Fetner limit his evidence to those points. That action was a valid exercise of the discretion of the trial judge. It is therefore apparent that most of the claims of denial of due process made by Fetner here in his brief in fact relate to the trial court's justified insistence that Fetner limit his examination and cross-examination of witnesses to matters material to those

allegations of his defense and counterclaims that were supported in law. A substantial federal question is not presented by the preceding.

With respect to those issues that *were* legally relevant herein, the trial court's statement in its opinion below that "[t]he defendant was given every opportunity to testify to facts which might lead to a conclusion that this plaintiff had any interest in this defendant different from the interest it has [in] any other borrower, that is to say, an interest other than that of having its contractual payments made when due." (R782a), is amply supported by the record, as is the trial court's statement in its opinion that " . . . after sustaining countless objections to questions put to defendant by his counsel concerning matters which related neither to the proven default nor to the alleged fraud, the trial judge urged defendant's counsel to restrict himself to the facts averred which would tend to prove the alleged fraud if indeed it existed." (R781a). The record is replete with evidence that the trial court encouraged Fetner to produce evidence relating to fraud or to an absence of default. (*See, e.g.*, R635a, 637a, 642a, 644a, 655a, 661a, 662a, 669a, 673a, 681a, 685a, 689a.) No federal question is involved in light of the above.

The Pennsylvania Superior Court's affirmance of the conduct of the trial rested on adequate state grounds. The Pennsylvania Superior Court held, clearly and succinctly, that the trial judge properly apprehended Pennsylvania law relative to the propriety of Fetner's claims.[1] The Superior Court held as follows:

---

1. It is noteworthy that the Superior Court observed that Fetner's claims were not relevant *in the mortgage foreclosure action* under Pennsylvania law. The court did not state that Fetner had no remedy. The court stated, at pages nine and ten that "appellant's remedy must be sought elsewhere," and at pages eleven and twelve that "[i]f any of them [the counterclaims] are actionable, it must be in an action not tied to this foreclosure as a Counterclaim."

"Attached to the appellant's Counterclaims were copies of Complaints filed against the sellers of the property, the estate of his real estate broker, two title insurance companies and PennDOT, averring misrepresentations and fraud in the sale of the property, most of which are repeated in his Counterclaim against the Bank.

We deal first with the appellant's claim that the Bank fraudulently withheld from him knowledge of the fact that PennDOT had obtained easement over a portion of the property nine days before the closing. At the time appellant talked to Albright, the preliminary title report, which was then available, did not include the easement because it had then not been created. Appellant does not claim that the Bank or Albright reported to him that no easement existed; he simply contends that the Bank had a duty to tell him that the title report showed an easement in PennDOT.

There is no basis for appellant's conclusion that the Bank or its mortgage procuring agent had any duty to search out defects in the title and disclose them to the appellant. Ordinarily, the relationship between the borrower and lender does not create a confidential relationship, *Grace et ux v. Moll,* 285 Pa. 353, 355, 132 A. 171 (1926), and none was shown to exist in this case.

An action based upon concealment will not lie, even as between a vendor and vendee, unless there is established an affirmative duty to disclose the existence of a title defect. *American Metal Fabricators Company v. Goldman,* 227 Pa. Superior Ct. 284, 289, 323 A.2d 891 (1974).

Ordinarily, there is no duty on the part of a lender to inspect the mortgaged property to determine that the borrower is obtaining that which he may have been promised by the vendor or that which he believes he is obtaining. Unless some further obligation is assumed, the lender's inspection of the premises to be mortgaged is made only to ascertain whether the property has sufficient value to secure the loan and is made by the lender for its benefit only.

Appellant did not contract with the Bank to review the title; he did not advise the Bank that he intended to rely on its inspection of the property; and no duty existed in law for the Bank to learn of or disclose any matter which appellant might deem a defect. If appellant was defrauded by the PennDOT easement of which he avers he was unaware, the deception was not perpetrated by the Bank and appellant's remedy must be sought elsewhere." Opinion of the Superior Court at pp. 7-10.

The Superior Court also held that:

> "The remaining Counterclaims were either unsupported by any proffer of evidence, or related to transactions or occurrences which were not part of or incident to the mortgage loan, and therefore properly excluded from consideration by reason of Rule 1148 of the PA. R.C.P. If any of them are actionable, it must be in an action not tied to this foreclosure as a Counterclaim." Opinion of the Superior Court at pp. 10-11.

Nor did the trial court improperly limit Fetner's right to present final argument. Although limitation of a right to present final argument may be a prima facie trial error in a criminal case, the rule is otherwise where, as here, the matter involved is civil and the judge has heard various arguments throughout the trial of the case. In *Commonwealth ex rel. Friedman v. Friedman,* 223 Pa. Super. 66, 297 A.2d 158 (1972), the Pennsylvania Superior Court has held as follows:

> "'A matter such as the length of argument is, of course, almost entirely within the discretion of the trial courts, see *Commonwealth v. Buccieri,* 153 Pa. 535, 551, 26 Atl. 228, 234 (1893).' *Baxter v. Philadelphia,* 426 Pa. 240, 254, 231 A.2d 151 (1967). Here, an experienced trial judge, thoroughly familiar with the law governing the case, concluded that he had heard sufficient argument on the facts during the course of the hearing and any further argument would only be repetitious." 223 Pa. Super. at 71. *See Baxter v. Philadelphia,* 426 Pa. 240, 231 A.2d 151, *appeal dismissed,* 389 U.S. 573 (1967).

Instantly, defendant had ample opportunity to argue throughout the trial. Extensive pleadings were filed, preliminary objections were briefed and ruled upon and an opportunity for the filing of briefs was allowed. Under all of the facts and the law as stated in *Friedman, supra,* the trial court's action and the Pennsylvania Superior Court's decision had an adequate basis in state law and that law does not conflict with any decision of this Court.

As previously noted, Fetner has also claimed here, as he did below, that the trial judge prejudged this matter and denied him due process of law, citing *Commonwealth v. Harrison,* 228 Pa. Super. 412, 323 A.2d 72 (1974). However, that case was a criminal case in which the trial judge involved reached premature conclusions that clearly abridged the presumption of

innocence that must be accorded a criminal defendant. Although the standards set forth in those criminal cases may well exceed those applicable in a civil action, the Bank submits that the conduct of the trial judge instantly was well within proper bounds and was not indicative of predisposition of the case. Although counsel for Fetner baldly asserts in his brief at 22, that "the matter had already been resolved by the trial judge prematurely," that statement ignores the fact that, as previously noted, the trial court continually suggested and encouraged possible relevant lines of questioning that might relate to a defense or to a proper counterclaim. A further example is recorded at page 140 of the transcript, R723a, where the following colloquy is of record:

> "THE COURT: Will you ask your client if the mortgage is current; whether he's in default; whether he's neglected to pay taxes; whether he's neglected to pay the fire insurance?
>
> I'm concerned, since your attacking the accounting that was given by the plaintiff, that this foreclosure is a proper one.
>
> Certainly if Mr. Fetner paid every payment when due and paid the taxes and insurance premiums, which he's obliged to pay, certainly there would be a defense to the foreclosure.
>
> I don't know if you choose to ask him that. I trust that Mr. Hershenson will. If he doesn't, I will; because I want to know from him whether this is a proper foreclosure or not."

Fetner's claim of prejudice is thus likewise insubstantial.

Fetner's claim that the trial court erred relative to discovery allowed by it and by allowing the Bank to call a witness whose name was not known until the day of trial also presents no basis for review by this Court.

With respect to his allegation that the trial court should not have allowed the testimony of the Bank's two witnesses because their names were not furnished to him prior to trial, the Bank notes that witness Carpenter was *deposed* before trial. Although Fetner characterized Mr. Carpenter as a "surprise witness," the record reflects that *Fetner* subpoenaed him for trial (R589a).

With respect to witness Wright, Fetner cites *Nissley v. Pennsylvania Railroad Company,* 435 Pa. 503, 295 A.2d 451, *cert. denied,* 397 U.S. 1078 (1969) for the proposition that failure of a party to disclose the names of witnesses prior to trial constitutes grounds for exclusion of the testimony of the witness whose name was not furnished. However, counsel for Fetner misapprehends the rule stated in that case. The general rule applicable to this question in Pennsylvania is that the trial court has *discretion* with regard to allowing testimony by witnesses whose names are not disclosed prior to trial pursuant to a request for same contained in interrogatories. There is no specific sanction under Pennsylvania law for failure to disclose the names of witnesses. *Tener v. Loblaw, Inc.,* 207 Pa. Super. 337, 217 A.2d 787 (1966). The rule may be otherwise *with respect to expert medical* witnesses by virtue of the decisions cited by Fetner. In *Nissley,* the expert witness whose name was not disclosed was an expert medical witness who testified concerning a critical and complex issue of medical causation. There, *the element of surprise* was viewed as particularly crucial, given the nature of the case. *See Nissley v. Pennsylvania Railroad Co., supra,* 435 Pa. at 509. In contrast to the preceding, the witness herein was presented to prove the amount of the default as of the date of the trial. In that respect, his testimony was virtually co-extensive with the allegations of paragraph ten of the complaint (R10a), which were well known to defendant prior to trial. Although the witness also testified concerning the procedure by which his calculations were reached, the record discloses that his testimony in that regard was not unique or unusual in an action of the type pursued here. Moreover, defendant had obtained information concerning the procedure employed by the Bank and with respect to many of

the figures during his depositions of Carpenter and Albright. (*See* R295a-319a, 523a-524a, 539a-541a.) The qualifications of Mr. Wright were not of critical importance and he was not expressing an opinion. Finally, and most importantly, the record clearly indicates that counsel for defendant was not sufficiently surprised to preclude him from engaging in pertinent cross-examination (*See* R608a-624a.) The Superior Court's decision on this point was properly based upon state law and presents no federal question; it is not in conflict with any decision of this Court.

II.

The Superior Court properly held that the trial court was correct in dismissing those counterclaims which were based upon federal securities law.

The second issue posed by Fetner in his petition, whether the loan program of the Bank was subject to federal securities laws, is simply irrelevant to this action. A determination that the Bank's loan process is or is not subject to the cited statutes is unnecessary to the decision below and can have no effect upon the ultimate outcome of this mortgage foreclosure action.

Fetner's Counterclaim XI below alleged that failure to disclose the existence of a PennDOT easement constituted a fraudulent omission of a material fact under applicable securities laws. The question whether the Bank is a "an instrumentality of the Government of the United States," thereby exempting it from the Securities Act of 1933, 15 U.S.C.A. §77c(2), has no bearing on this action because even if the securities acts are applicable to the Bank, a counterclaim which states a cause of action which is within the exclusive jurisdiction of the federal courts is properly stricken under Pennsylvania law. The statutes cited by Fetner are clearly pursuable in a federal forum and provide a federal remedy based upon a federal statute, not a cause of action pursuable in the courts of Pennsylvania (Fetner admits, at page 27 of his brief here, that jurisdiction over this

claim is exclusively vested in the federal courts). Moreover, the arguable remedy for the alleged fraud under the securities acts relates to the validity of the securities transaction, not to the mortgage transaction. Finally, the securities question posed by Fetner goes to the purchase of stock which was incidental to the loan transaction; it does not arise out of the same transaction (default in the mortgage), the transaction upon which the cause of action of the Bank was based. Pa. R.C.P. No. 1148.

Neither the trial court nor the Pennsylvania Superior Court found it necessary to decide whether the Bank's stock was subject to exemption under the Securities Act of 1933 or the Securities and Exchange Act of 1934. In fact, neither directly addressed that question because each implicitly decided that any violation thereof was not procedurally cognizable as a counterclaim to this mortgage foreclosure action under Pennsylvania civil procedure. Therefore, this Court need not decide that issue, nor would a decision that the Bank is subject to the cited acts have any effect on the outcome herein, absent a concurrent rewriting by this Court of Pennsylvania Civil Procedure and Pennsylvania Rule of Civil Procedure No. 1148.

Under the above circumstances, it is respectfully submitted that this Court need not and should not review this question.

CONCLUSION

Fetner's petition for a writ of certiorari should be denied because there is no overriding reason why the writ should be granted. No conflict between circuit courts of appeals or with a decision of this Court is involved and there is no important question of federal law of wide applicability that needs to be reviewed. The decision below was based upon adequate state grounds and does not involve a substantial federal question.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF COMMON PLEAS OF BUCKS COUNTY

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY

CIVIL

NO. 77-2577-04

MORTGAGE FORECLOSURE

FEDERAL LAND BANK OF BALTIMORE

vs.

PHILIP JAY FETNER

In this mortgage foreclosure action, defendant has appealed to the Superior Court from our entry of a Decision, after trial without jury, in favor of plaintiff and against defendant in the sum of $137,195.45, together with interest and costs of foreclosure, and from our dismissal of defendant's Exceptions thereto.

In its complaint plaintiff alleges a straightforward real estate transaction under which defendant borrowed from plaintiff the sum of $117,500.00 secured by a mortgage upon some twenty five acres, with improvements erected thereon, located in Nockamixon Township, this County. Alleging default in payment of monthly installments from July 1, 1976 to February 1, 1977, totalling $8,106.36, and further alleging defendant's failure to pay real estate taxes in the sum of $1,659.16, plaintiff exercised its right of acceleration under the terms of the mortgage and demanded judgment for the unmatured principal, monthly installments due, interest, real estate taxes and attorney's commission, totalling $137,195.45.

Appendix A

In a prolix Answer, New Matter and Counterclaim, defendant, inter alia, denied that the instrument sued upon "is a mortgage", denied having defaulted, denied that real estate taxes were due "under the terms of the mortgage" and alleged "that after reasonable investigation", defendant had been unable to gain sufficient knowledge from which to form a belief as to the truth of the averment that the amount claimed was due plaintiff.

Defendant's New Matter and Counterclaim contain 169 paragraphs. In New Matter defendant alleges that Federal Land Bank of Baltimore does business within the Commonwealth of Pennsylvania and is in violation of the registration requirements imposed upon foreign corporations under 15 P.S. 2014. He challenges the attorney's fee of 10% provided for in the agreement, alleging that it is excessive. He acknowledges that he had made a long-term "residence home loan". And, finally, he incorporates by reference an Amended Complaint in a non-related action brought by defendant against his grantors, Dr. Stewart Haggerty and Martha Haggerty, his wife, Commonwealth Land Title Insurance Company, and Doylestown Title and Abstract Co., Inc., which companies issued title insurance at the time of his purchase on October 9, 1974, the Estate of Elizabeth James, deceased, who had traded as Elizabeth James Country Real Estate and was the realtor who handled the sale and assisted in securing the mortgage loan, and the Commonwealth of Pennsylvania, Department of Transportation, condemnor of an easement over the land.

In Count I of his counterclaim against plaintiff defendant, an attorney-at-law, then incorporated by reference the substance of his Answer and New Matter and alleges, in substance, that plaintiff fraudulently concealed from him its knowledge of an easement granted Penndot prior to his settlement. He thereupon claimed damages from plaintiff "in excess of the sum of $250,000.00 or in the alternative $180,000.00, and in addition thereto punitive damages in the sum of $500,000.00, together with costs of suit and legal interest". Ten more counts follow.

Appendix A

Count II alleges that for some time past defendant had "repeatedly questioned" the accuracy of statements of his account received from plaintiff, alleged that statements had been sent "too late to pay the amount owed or some time not at all", claimed that defendant had repeatedly asked plaintiff to discuss discrepancies but that such requests had been refused by plaintiff, and alleged that he therefore was unable to determine "what amounts if any are due". Defendant then alleged that "it is clear that plaintiff has acted in bad faith in its dealings with him" in order "to create a delinquency and force a foreclosure so as to avoid and moot the litigation regarding the purchase of the property, in which plaintiff was fraudulently involved".

Defendant asserts that plaintiff's "actions" (presumably its alleged mailing of statements and refusal to discuss the account with defendant) were "intentional, wilfull and malicious, and done, in part, for the purpose of forcing defendant out of said property". These actions of plaintiff, defendant claims, cost him "substantial time, numerous legal fees and expenses, great aggravation, . . . possible loss of property", and "extensive credit problems" which led him to demand, in Count II, compensatory damages of $200,000.00 and punitive damages of $500,000.00.

Here it would be appropriate to refer to the litigation in which defendant herein seeks recovery against his grantors, the title insurance companies, the realtor, and the Commonwealth. In essence plaintiff therein avers that the realtor served as an agent for him in his search for "a suitable and secluded gentleman's country estate and horse farm in the Bucks County area" and had prior to the execution of the agreement of sale with the grantors on June 5, 1974, informed the defendant that the many trees, shrubs and plantings on the property, setting the natural boundaries thereof, gave it that "certain beauty, unique privacy and distinct character" which was "especially suitable for the gentleman's country estate and horse farm" that the defendant was looking for. Then, alleging the execution of the

agreement of sale with the grantors, defendant alleges that he sought title insurance through the title company defendants, and secured a preliminary title report from them on June 10, 1974. He then alleges that thereafter, on July 29, 1974, and subsequent to the execution of the agreement of sale, his grantors "covertly and in controvention of the terms of the agreement", executed a deed of easement which conveyed to the Commonwealth of Pennsylvania, Department of Transportation more than 7,000 square feet of land covered by trees and shrubs, a part of the natural boundary of the property. He went on to aver that the deceased realtor had represented to him that no highway expansion was planned on or near the property and that relying upon the alleged misrepresentation of the deceased realtor he took possession of the property only to learn thereafter that a planned expansion by PennDOT was well known to area residents prior to the execution of the agreement. Defendant concluded that his grantors thus acted fraudulently.

Defendant, in that action, went on to allege that prior to his settlement on October 9, 1974 the defendant title insurance companies issued its policy of insurance without reference to the deed of easement referred to above which, he averred, had been recorded on October 1, 1974. He termed the title companies "grossly negligent", the grantors the "perpretrators of fraud", the Commonwealth as "co-conspirators" with the grantors as well as "trespassers" who maliciously destroyed certain trees on the property "and consequently severely altered the character of the property and thereby greatly reduced the value thereof".

Defendant sought by way of Count I of the collateral action against his grantors and others (a) compensatory damages in the sum of $180,000.00 (the purchase price of the property), plus all interest thereon paid by defendant plus costs and expenses incurred by him in connection with his intended recission of the agreement, (b) the sum of $50,000.00 for reimbursement for alleged improvements made by this defendant to the property and (c) punitive damages in the sum of $500,000.00 for the

"gross, wilfull, wanton, malicious and fraudulent misrepresentation [of his grantors, et al] which have irreparably damaged plaintiff". Alternatively in Count I of the collateral action, this defendant sought damages in excess of $150,000.00 which allegedly represented value of the destroyed trees, shrubs and plantings" and punitive damages in the sum of $500,000.00 for those defendants' alleged gross, wilfull, wanton and malicious and fraudulent misrepresentations.

Count II of this defendant's said complaint incorporates by reference a substantial portion of Count I within it and seeks damages from the defendant title insurance companies in a sum in excess of $100,000.00 for breach of contract in failing to discover the deed of easement allegedly conveyed to his grantors by PennDOT and allegedly recorded October 1, 1974.

Now, we return to the present action. Count III incorporates into this unusual mortgage foreclosure another dimension and, of course, incorporates by reference much of the Answer, New Matter and Counterclaim which preceded and followed those allegations in Count III. Here defendant states that in November 1974, "as a result of exposing corporate overseas bribery and a dispute with his [defendant's] employer, defendant was forced to leave his position as a result of a dispute with his employer", which left him without a regular source of income. It is then alleged that upon being informed by defendant of these problems, plaintiff had told him it would, if necessary, give him the time needed to establish his "income flow" and thereupon defendant relied upon such assurances and made further improvements to the property as well as "substantial investments in new business ventures".

He then complains in Count III of his counter claim that although late in making his July 1975 payment he had requested that plaintiff not release information concerning the overdue

nature of the account and, as well, requested that "all communications with Defendant in Fetner v. Haggerty, et al. be very circumspect".

Plaintiff agreed, according to defendant, but notwithstanding such agreement had disclosed to a prospective lender from whom defendant sought short-term financing that the mortgage payments were indeed three months overdue and that it was considering some type of legal action. As a consequence, said defendant, "all financing fell through" and moreover his grantors' attorney learned that foreclosure proceedings were imminent as a result of which "all serious settlement discussions were terminated by them." Concluding that such alleged disclosures made by plaintiff were in violation of the Federal and Pennsylvania Truth in Lending Act and Fair Disclosure of Credit Act, and "related statutory provisions", in violation of a duty owed by plaintiff to defendant and in violation of "agreements and understandings" made between plaintiff and defendant, defendant alleged that plaintiff's actions were for the purpose of forcing a foreclosure in order to render moot and conceal the "original fraud". For this behavior as well as for his loss of credit, "economic losses relating to his profession", etc., defendant demanded judgment of the additional sum of $275,000.00 against his mortgagee by way of compensatory damages, and $700,000.00 in punitive damages.

Count IV relates to matters preceding the mortgage commitment and at settlement. Specifically defendant complains that plaintiff did not afford him with 80% financing which he had allegedly been told was available, but instead offered him 60% financing which due to the pressure of time, he alleges, he was obliged to accept, all to his detriment. He also complains of plaintiff's requirement concerning secondary financing. Alleging that plaintiff's representation concerning interest rates and representations concerning separate secondary financing were false and fraudulent and made "with the intent to deceive and defraud defendant and to induce him to obligate himself to

plaintiff for mortgage financing", defendant in this Count demands judgment of $50,000.00 in compensatory damages.

In Count V of the counterclaim defendant asserts that both in 1975 and 1976 plaintiff, without advance notice to defendant, paid school taxes due upon the mortgaged real estate and then demanded reimbursement for the sums paid together with interest all the while knowing of defendant's "cash flow problems". These school tax payments made by plaintiff, according to defendant, were made in order that there might be justification to foreclose and deprive defendant of the property and to "moot and conceal the original fraud by plaintiff". Accordingly, defendant demanded $100,000.00 in compensatory damages and $500,000.00 in punitive damages.

In Count VI defendant avers that he is a "good, honest and virtuous citizen who was an esteemed member of the community in credit and reputation". Alleging that plaintiff's "actions" injured his good name, fame and reputation resulting in his loss of credit, economic harm, humiliation, embarrassment, aggravation, etc., etc., defendant demands judgment of $400,000.00 in compensatory damages, together with $700,000.00 punitive damages.

Count VII alleges that certain provisions in the mortgage which he had signed were "unconscionable, illegal and/or unenforceable" and were inserted in the mortgage, as defendant sees it, with some malicious intent, thus entitling him to judgment against plaintiff in the sum of $50,000.00, compensatory damages and $500,000.00 in punitive damages.

In Count VIII defendant expressed the belief that plaintiff, prior to settlement had in its possession a survey of the property and a preliminary title report which it failed to reveal to him in breach of a duty owing him. And alleging that such behavior on the part of plaintiff, his mortgagee, was intentional and

malicious, designed to cause him substantial harm, defendant asks this Court to award him the sum of $250,000.00 compensatory damages and $500,000.00 punitive damages.

Count IX states that on August 10, 1976 defendant sent plaintiff a check in the amount of $2,000.00 which had not been credited to his account and avers that plaintiff refused to check its records to determine whether such payment had been received, as a result of which defendant was forced to spend time and legal fees, with the further result that he suffered losses in time from his business and loss of credit. Since this behavior on the part of plaintiff was also averred to have been intentional, malicious and wanton and to create a foreclosure posture, defendant asked for judgment of $50,000.00 compensatory damages and $250,000.00 punitive damages.

In Count X of his counterclaim defendant complains, in essence, that although it had been represented to him that plaintiff had a very lenient attitude in the event "any payment problems would arise", nonetheless when defendant's "cash flow problems" presented themselves, plaintiff went ahead with its foreclosure action. Defendant recites at great length the efforts that he had made to forestall foreclosure and charges plaintiff with having acted fraudulently and with the malicious intent to "moot the question of the original fraud", all to his great damage. Wherefore he claimed once more of plaintiff the sum of $200,000.00 in compensatory damages and $1,000,000.00 in punitive damages.

Finally, in Count XI, after incorporating paragraphs, one through one-hundred seventy of the Answer, New Matter and Counterclaim (Count XI is initiated with paragraph 171) defendant charges plaintiff with having violated certain provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. He further charges that plaintiff's failure to inform him of the existence of an easement across the

property, financed by plaintiff for defendant, was a fraudulent omission of a material fact contrary to the 1934 Act. The prayer for relief under Count XI calls for the "recission of the entire loan transaction, refund of all interest paid, and damages in the amount of $500,000.00 both pecuniary and punitive . . . ."

So that it might not be thought that the writer of this opinion may be guilty of that prolixity which he finds in defendant's Answer, New Matter and Counterclaim, let it be said that he deemed it necessary to outline defendant's pleadings in as succint a fashion as possible (under the circumstances) in order that the Superior Court might better understand the events which took place at the trial of the matter and which are here submitted for scrutiny.

The Superior Court may be asked to review the total of forty-six Exceptions filed to the proceedings in all of its aspects. Defendant has not favored us with a statement of the precise matters complained of but we shall assume that he will brief and argue all issues excepted to. We shall address but a few of them and even these which we mention, in our opinion, are without merit on their face. It should be added, gratuitously, that had plaintiff submitted a motion for a summary judgment upon the pleadings prior to the trial, it would have been granted forthwith. That was not done. Hearing was scheduled and held.

The record will reveal that two witnesses were offered by plaintiff through whom the mortgage, mortgage bond, and so-called real estate mortgage bond were introduced and received in evidence. Testimony established that the Federal Land Bank was chartered under an Act of Congress in 1916 and under the Farm Credit Act of 1971. It receives no Federal funds from the government and exists in order to make mortgage loans to farmers.

A "statement of debts" of this defendant was also received into evidence which reflected that his total debt as of February

15, 1978 (the date of hearing) including unmatured principal of $112,600.00, various installments due, tax insurance advances, fire insurance advances, interest to October 14, 1978 and attorney's commission, totalled $147,906.97.[1] The last payment made by this defendant upon his mortgage obligation was July 6, 1976, one year and seven months prior to the hearing. He has remained a resident of this "gentleman's farm" throughout this period of default. During cross-examination of plaintiff's witnesses, defense counsel made numerous efforts to inquire into all manner of matters not germane to the foreclosure question (See e.g., N. T. pp-42-46). This was not permitted.

After plaintiff rested its case defendant called an agent of the plaintiff who dealt with defendant when he sought the mortgage loan. In connection with counsel's examination of this witness the hearing judge, for the first of many times thereafter during a long day, suggested to defense counsel that having alleged fraud in various manners on the part of plaintiff, he should set about proving it. (N. T. p. 52). Objection after objection was sustained by the trial judge to questions which went neither to plaintiff's right to foreclose nor to the alleged fraud. (See e.g., N.T. pp. 99 through 112). At that point further examination of plaintiff's agent was denied defense counsel. Of this defendant complains. We shall respond to that complaint merely with a suggestion that a review of counsel's examination of the witness will amply justify the Court's action.

Thereafter the defendant testified. He was given great latitude. Once again, after sustaining countless objections to questions put to defendant by his counsel concerning matters which related neither to the proven default nor to the alleged fraud, the trial judge urged defendant's counsel to restrict himself to the facts averred which would tend to prove the

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1. "Our decision erroneously stated $137,195.45, the amount originally claimed".

alleged fraud if indeed it existed. No evidence was forthcoming and we are satisfied that none existed. The extravagant representations made by this defendant in his lengthy Answer, New Matter and Counterclaim speak for themselves. The defendant was given every opportunity to testify to facts which arguably might lead to a conclusion that this plaintiff had any interest in this defendant different from the interest it has any other borrower; that is to say, an interest other than that of having sufficient security for the loan it advanced and an interest in having its contractual payments made when due.

Accordingly, the Court refused to hear further testimony from the defendant, being satisfied that the testimony offered was as lacking in merit, and at times in credibility, as was the defendant's pleading. Few reported cases discuss defenses and counterclaims in mortgage foreclosure actions. Certainly, payment, fraud in the inducement, want of consideration, release, setoff, and denial of execution of the mortgage, may be pleaded by way of defense in answer to a complaint in foreclosure. P.L.E. Mortgages, Section 225. On the issue of fraud, Section 225 states:

> "If defendant intends to insist on a fraud in fact, it is not sufficient to allege in the answer facts from which an inference of fraud may be drawn. Fraud must be charged distinctly."

Counterclaims in foreclosure actions are governed by Pa. R.C.P. 1148 which states:

> "A defendant may plead a counterclaim which arises from the same transaction or occurrences or series of transactions or occurrences from which plaintiff's cause of action arose."

According to 3A Anderson, Pa. Civ. Prac. Section 1048.4 and 1048.5, a defendant may properly counterclaim for damages for

breach of warranty of title, or for any unliquidated claim which the parties had agreed to adjust when the mortgage came due, but, defendant may not counterclaim for unliquidated damages from torts unrelated to the mortgage action. In briefing the question counsel have referred us to very few cases which speak to the specific matters before us. In *First Federal Savings and Loan Association v. Street Road Shopping Center Inc.*, 68 D. & C. 2d 751 (Bucks 1975), affirmed 238 Pa. Superior Ct. 770 (1975), it was held that a mortgagee does not waive its right to foreclose by accepting late payments. It was further held that in that case a 5% attorney's fee was reasonable where the debt exceeded $300,000.00. In *Kornicki v. Abrams,* 28 Bucks Co. L. Rep. 215 (1976) it was held that a mortgagee is under no duty to inspect the premises to be mortgaged.

On the issue of taxes, counsel for plaintiff has referred us to *Pennsylvania Trust Co. v. Earnest,* 128 Pa. Superior Ct. 331 (1937) wherein it was held that it is proper for a mortgagee to pay taxes when they become delinquent. Unfortunately, on the issue of fraud, counsel have referred us to no mortgage foreclosure case dealing with factual averments which are even vaguely similar to the one at hand and none have been found. No doubt none exist nor will hereafter arise.

We believe that the 10% allotted for counsel fees is appropriate in this case. Such fees have been previously allowed. See *Plum Tree Inc. v. Seligson,* 224 Pa. Superior Ct. 471 (1973); *Mack v. Fennell,* 195 Pa. Superior Ct. 501 (1961). Such attorney's fees are properly includable in a judgment and belong to a plaintiff. *Commonwealth v. Pennsylvania Loan Corp.* 127 Pa. Superior Ct. 253, 256 (1937). True, such fees must be reasonable. However, reasonableness must be determined by the circumstances of each case as stated in *Foulke v. Hatfield Fair Grounds Bazaar, Inc.*, 196 Pa. Superior Ct. 155, 160 (1961) at page 160:

> "The mortgagee, having loaned a fixed sum of money should recover both principal and interest without dimunition for expenses which he might be forced to pay."

The extent of services rendered by counsel in this case, given the fact that the complaint was filed on March 16, 1977, given the fact that defendant chose to file his meritless Answer, New Matter and Counterclaim, take lengthy depositions thereon, demand trial in an effort to forestall foreclosure, and given the fact that counsel was obliged to engage in lengthy preparation for trial, as well as spend a day on trial, satisfies us that the counsel fee allowed is reasonable under the circumstances. It should be added, obviously, that defendant has now appealed to the Superior Court. In this connection counsel is called upon to brief and argue plaintiff's position before that Court, thus leading to substantial additional expense to plaintiff for counsel fees.

In brief, it is the writer's judgment that this defendant has acted in bad faith from the inception of the mortgage foreclosure action. Since July 1, 1976 to date, as was acknowledged on July 25, 1978, defendant has continued to enjoy residence and conduct a business at the foreclosed real estate, while plaintiff-mortgagee continues to advance funds for the payment of real estate taxes, and necessary insurance. He has not pleaded a valid defense to the foreclosure action and has not proved one. While having pleaded fraud at great length in his New Matter and Counterclaim, it is quite obvious that there is no substance in the same.

For these reasons we entered judgment against defendant.

BY THE COURT:

s/ J. J. Bodley
J.

September 8, 1978